INDEX

	Page
Reply to Respondent's Statement of Facts	2
Reply to Respondent's Point I	4
Reply to Respondent's Point II	6
Reply to Respondent's Point III	10
Conclusion	12

CITATIONS

Cases

Page

Chipman, Ltd. v. Jeffrey, (1920) 251 U.S. 373, 40 S.Ct. 172, 64 L.Ed. 314 7

Hanson v. Denckla, (1958) 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 1283 ..... 4, 5

Harris v. Balk, (1905) 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 5

Hexter v. Day-Elder Motors Corporation, 182 N.Y.S. 717, 718 8

International Shoe Co. v. Washington, (1945) 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 ..... 7, 8, 9, 12

Jennings v. McCall Corp. (C.A. 8, 1963) 320 F.2d 64, 67 4

McGee v. International Life Insurance Co., (1957) 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 ..... 7, 8, 10

Morris & Co. v. Skandinavia Insurance Co., (1929) 279 U.S. 405, 49 S.Ct. 360, 73 L.Ed. 762 7

Old Wayne Life Asso. v. McDonough, (1907) 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 9

Perkins v. Benguet Consol. Min. Co., (1952) 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 9

Perkins v. Benguet Consol. Min. Co., 158 Ohio State 145, 107 NE2d 203 8

Phillips v. Anchor Hocking Glass Corp. (Ariz. 1966) 413 P.2d 732 ..... 10, 11, 14

Robinson Brick & Tile Co. v. Copperstate Supply Co., (Ariz. 1966) 410 P.2d 96 3

Simon v. Southern Ry. Co., (1915) 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492 ..... 9, 10

STATUTES AND RULES

Rule 4(d)(3) Rules of Civil Procedure.....2, 4, 11
Rule 52 Rules of Civil Procedure..... 4
Arizona Revised Statutes, § 10.....2, 8, 9, 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 283

UNION TANK CAR COMPANY, a New Jersey corporation,

Petitioner,

vs.

DRAGOR SHIPPING CORPORATION, a Delaware corporation, formerly WARD INDUSTRIES CORPORATION,

Respondent.

REPLY TO BRIEF OF RESPONDENT

It is conceded that Respondent, Dragor Shipping Corporation, was doing business in Arizona and was licensed to do business there for 17 years, including the date on which it incurred the debt sued upon in this action.

It is further conceded that service of process was made, both upon Dragor's duly appointed agent and upon the Arizona Corporation Commission pursuant

to Section 10-481 Arizona Revised Statutes. Respondent claims, contrary to record evidence, the authority of its appointed agent had been revoked before this suit was filed, but does not dispute that on such revocation the Arizona law (§ 10-481, A.R.S.) designates the Arizona Corporation Commission, irrevocably, as agent for the service of process upon it.

The legal question which calls for certiorari is created by the decision of the Court of Appeals which held that a settlement agreement executed between Petitioner and Respondent before it attempted to withdraw from Arizona obviated the effect of Rule 4(d)(3) of the Federal Rules of Civil Procedure and insulated Respondent from being sued in Arizona on an obligation incurred while it was licensed in that state.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Respondent seeks to create a false impression that a fact dispute exists with respect to the questions presented by Union's petition. Dragor characterizes Petitioner's statement of facts as "erroneous and misleading" (R. 3), but fails to point to a single factual inaccuracy therein, or to note that Petitioner's statement is substantially identical with that contained in the opinion of the Court of Appeals. Respondent's re-statement of facts in its brief introduces no new or different fact consideration, but is included only as an excuse for further emphasizing a fact which Respondent believes of controlling significance and which is not disputed — that the agreement settling the Arizona

claims and causes of action was executed by Dragor in New York rather than in Arizona.[1]

Respondent's assertion that Arizona's issuance of a certificate of withdrawal simultaneously terminated the authority of its statutory agent to accept service constitutes a partisan legal conclusion advanced in the affidavit of Dragor's lawyer and president, rather than a fact (R.20). This assertion was expressly contradicted on the record in petitioner's counter-affidavit and no evidence, documentary or otherwise, was ever offered to establish the revocation of the agency of C. T. Corporation or that C. T. Corporation had acted without authority in accepting service of process (R.63). The burden of proof was on Respondent. *Robinson Brick & Tile Co.* v. *Copperstate Supply Co.*, (Ariz. 1966), 410 P. 2d 96.

The legal conclusion of Dragor's president was erroneous because the formal certificate issued by the Arizona Corporation Commission contained on its face an exception which stated "and thereupon such corporation ceased to exist, except as to creditors." (R.25) At the time of the attempted withdrawal by Dragor, Petitioner was a creditor of Dragor on an obligation arising out of acts performed in Arizona while Dragor had been qualified to do business in that state. By the very terms of the certificate, Dragor's authority to transact business in Arizona, therefore, was *not* terminated as against Petitioner. This conclusion is further supported by the Arizona statutes which provide the manner in

(1) In its opinion the court below erroneously stated that the stipulations dismissing the Arizona suits were also executed in Arizona (App. A pp. 20, 22). On petition for rehearing, Union directed the attention of the court below to the fact that the stipulations were prepared in Arizona by Arizona counsel that and the cases were dismissed by order signed October 3, 1963, the same day the agreement of settlement was signed in New York. (Petition for Rehearing, p. 2)

which revocation may be made and which contain no provision for revocation of the statutory agent by the issuance of a certificate of withdrawal. (See Appendix C, pp. 26-27).

Because judgment was granted on the pleadings, Rule 52 F.R.C.P. did not apply and no special findings of fact or conclusions of law were necessary to support the trial court's judgment. Nevertheless, the judgment (R. 151) necessarily was based on finding of the facts necessary to support the jurisdiction of the court.

Jurisdiction is a question of fact, or a mixed question of fact and law, and the Court of Appeals was therefore bound by the trial court findings, but erroneously disregarded them. *Jennings* v. *McCall Corp.*, (C.A. 8, 1963) 320 F.2d 64, 67.

Reply to Respondent's Point I

In support of the opinion below, respondent cites authorities for the proposition that a compromise and settlement supersedes any pre-existing claims which the parties thereby intend to resolve (Respondent's Brief pp. 13-14). These cases correctly state the general common law principle, but none of them to the slightest degree holds that a compromise and settlement insulates a foreign corporation from its previous contacts with the state so as to prohibit the courts of that state from constitutionally exercising jurisdiction over its person. Respondent makes no effort to bridge this gap or to show what policy or jurisdiction exists for concluding that a compromise and settlement agreement should have this effect on jurisdictional due process, and thus nullify Rule 4(d)(3).

The only case Respondent cites on due process is *Hanson* v. *Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.

1283. There is not the slightest resemblance between the cases. *Hanson* v. *Denckla* did not involve compromise and settlement, but a situation in which a Florida probate court had attempted to exercise personal jurisdiction over a Delaware trustee by means of service of publication.

In the instant case, the defendant had done business in Arizona, had been licensed there 17 years, had, while so licensed, defaulted in a large construction contract in Arizona, and had been sued for such breach, had given its promissory note in settlement of the claim for damages, and had been personally served on an action brought in Arizona for payment of the note.

In *Hanson* v. *Denckla,* jurisdiction was denied because there was no "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state."

Dragor can make no claim of lack of purposeful contacts, nor any claim that suit in Arizona offends "traditional notions of fair play and substantial justice."

Since *Harris* v. *Balk* (1905) 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023, it has been the law that the question of jurisdiction does not depend upon the "so-called [redacted] of the debt." The court said:

> "By situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."

Nothing in the documents states or infers that they would create a New York contract. To the contrary,

as Respondent admits, Union dictated the settlement, and as pointed out in the petition, execution of the contract in New York was merely fortuitous because that is where Isbrandtsen, the guarantor (R.8), happened to be at the moment.

Respondent, however, did succeed in inducing the court below to accept and adopt the legal fiction that all such contacts lost their jurisdictional significance because of a compromise and settlement agreement executed in another state. Yet the court below attributes greater jurisdictional significance to the mere place of execution than it was prepared to attribute to the activities which prompted the agreement.

Reply to Respondent's Point II

As a mere legal conclusion, the uncorroborated statement by Respondents that Dragor had "duly terminated" the authority of its statutory agent did not require contradiction, but it is, in fact contradicted by the record, by the terms of the certificate of withdrawal, and by the affidavit of Mr. Thomas C. McConnell, in relevant part as follows (R.63):

> ". . . that this affiant denies the statement made in the Weiser affidavit that 'as appears from the formal certificate of the Arizona Corporation Commission, a copy of which is hereto annexed as Exhibit 1, Ward formally withdrew from the State of Arizona on April 30, 1964. Simultaneously, the authority of its statutory agent to accept service on its behalf was duly terminated'; and affiant says that actually said formal certificate shows that there was an exception therein contained which stated 'and thereupon said corporation ceased to exist, except as to creditors'; that at the time of said attempted withdrawal by Ward the

> plaintiff Union was a creditor of Ward on an obligation created by acts performed in Arizona at a time when Ward was qualified to do business in Arizona and therefore by the very terms of the affidavit Ward did not terminate its authority to do business in Arizona as against this plaintiff."

As pointed out, *supra,* the burden of proof was on Respondent, and the trial court resolved this fact controversy in favor of Petitioner.

Respondent's argument is summarized as follows:

> "Neither the failure to revoke the statutory agency nor the substitution therefor by a state agency under a state statute would warrant any jurisdiction *in personam* over the withdrawn foreign corporation by the courts of that state upon causes of action arising outside the state. The foregoing proposition of law has been settled by this Court for decades."

In support of this statement, Respondent does not cite any recent pronouncement of this Court. *International Shoe* v. *Washington* and *McGee* v. *International Life Ins. Co.* are not mentioned.[2]

Instead, Respondent cites to this Court a series of cases, all decided before 1929, construing widely different statutes and widely different fact situations, the most recent of which is *Morris & Co. v. Skandinavia Insurance Co.* (1929), 279 U.S. 405, 49 S.Ct. 360, 73 L.Ed. 762, which involved an action in Mississipi by a Louisiana corporation against a Danish corporation on an insurance policy issued in Argentina.

Chipman, Ltd. v. Jeffrey, 251 U.S. 373, 40 S.Ct. 172, 64 L.Ed. 314, a 1920 case, is said by Respondent

---

(2) *International Shoe Co.* v. *Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, L.Ed. 2d 223.

to present "the precise issue." Even before *International Shoe* and *McGee*, that case would not have been in point because it was based on the New York statute containing this extremely limited provision:[3]

> "The filing of such certificate shall not, however, *affect any action pending* at the time of such surrender, *or affect any action in the state upon any contract made by the corporation in this state* before the filing of the certificate of surrender of authority." (Emphasis supplied)[4]

This obviously cannot be compared with Section 10-481, A.R.S. which provides in pertinent part:

> "Actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state. . ."

These ancient cases were not cited to the Court of Appeals, but are apparently cited now in an effort to bolster the comment in the opinion below (R. 23): "Arizona has no interest in providing Union with a forum . . ." for this action.

The effect of this holding is to declare that the Due Process Clause *actually prohibits* Arizona from granting relief against a foreign corporation on a cause of action alleged to arise outside the state and not related to the activities of the corporation within the state.

This is error. This court held in *Perkins v. Benguet Consol. Min. Co.*, (1952) 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485, that, contrary to the older decisions holding that the Due Process Clause *precluded* a state from authorizing its officials to accept service on a corporation

---

(3) As quoted in *Hexter* v. *Day-Elder Motors Corp.*, 182 N.Y.S. 717, 718.

in proceedings to enforce an obligation arising outside the forum,[4]

> "that conception now has been modified by the rationale adopted in later decisions and particularly in *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed 95, 66 S.Ct. 154, 161 A.L.R. 1057."

The court held that so long as "traditional notions of fair play and substantial justice" are not offended, it does not violate federal due process for a state to take or decline jurisdiction of a corporation. *Old Wayne Life Asso.* v. *McDonough,* 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed 351, and *Simon* v. *Southern Ry. Co.,* 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed 492, on which the Ohio court had relied (and on which Respondent relies) were declared no longer to be the law.

On remand to the Supreme Court of Ohio, that Court, remarking that the Supreme Court had held that "due process neither prohibits or compels the taking of jurisdiction" directed the trial court to take jurisdiction. *Perkins* v. *Benguet Consol. Min. Co.,* 107 N.E.2d 203.

In the instant case the trial judge held that either under the Arizona statute or the Federal Rules of Civil Procedure jurisdiction had been obtained and that sufficient contacts existed, and held Dragor to answer. This was correct under *Benguet, supra,* for ". . . consideration of the circumstances which . . . ultimately will determine whether the courts of that state will choose to take jurisdiction is reserved for the courts of that state."

---

(4) cf. Section 10-481, Arizona Revised Statutes, requiring an *irrevocable consent to service of pleadings or process,* effective on withdrawal from the state.

Contrary to the trend "toward expanding the permissible scope of state jurisdiction over foreign corporations,"(5) the decision of the Court of Appeals regresses to the reasoning of *Simon* v. *Southern Ry. Co.*, and similar cases.

Answer to Respondent's Point III

The Court of Appeals obviously came to an erroneous conclusion when it held that Union's claim under its promissory note, which arose out of Arizona litigation, which in turn arose out of Dragor's breach of a multi-million dollar contract to be performed in Arizona, was not an action "arising out of or involving business done or transactions arising" in Arizona.

The Arizona Legislature, in providing disjunctively in A.R.S. 10-481, that actions might be commenced, *whether* arising out of *or* involving business done *or* transactions arising in the state, was attempting to give the broadest and most liberal construction to the statute. The Legislature was putting no limitations on its officials such as were present in the ancient cases cited by Respondent, such as *Simon* v. *Southern Ry. supra,*

The Arizona Supreme Court also places the broadest and most liberal construction upon the amenability of non-resident defendants to the jurisdiction of the Arizona courts, so long as the traditional notions of fair play and substantial justice are satisfied. *Phillips* v. *Anchor Hocking Glass Corp.*, (1966), 413 P.2d 732.

If, as the trial court found, the settlement agreement and note were transactions arising in Arizona, and if, as the Court of Appeals held, the Due Process Clause

(5) McGee v. International Life Insurance Co., 355 U.S. at page 222, 78 S.Ct. at page 201.

precludes the enforcement of Section 10-481, Arizona Revised Statutes, solely because the parties had executed a compromise and settlement agreement in New York, then the Court of Appeals decision has, for all practical purposes, and effectively, declared Section 10-481 as well as Rule 4(d)(3) of the Federal Rules of Civil Procedure unconstitutional.

There is no doubt that Dragor attempted to withdraw from Arizona in order to delay and impede Union in the collection of its debt.

In *Anchor-Hocking,* the Arizona Supreme Court held that it is unnecessary for a defendant to "purposefully" act within the forum state. It said:

> "To do so, is to revitalize the 'implied consent' theory emasculated by the International Shoe case and to reverse the trend expanding state jurisdiction over nonresidents which trend was recognized in the Hanson decision. To make the requirement of purposeful activity within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction of the defendant."

Certiorari should be granted because the decision of the Court of Appeals has decided an important state question in a way in conflict with applicable state law, and has decided a federal question in a way in conflict with applicable decisions of this court and the Federal Rules of Civil Procedure promulgated by this court.

CONCLUSION

The "estimate of the inconveniences" mentioned in *International Shoe* is also relevant here.

In May, 1962, Union filed a diversity action in the federal court in Illinois against Dragor to recover the losses it had sustained by reason of the default of the Joint Venture. Dragor moved to transfer the case to the federal court in Arizona pursuant to 28 U.S.C. 1404(a),(R.43) and submitted the affidavit of its then president, in part as follows (R.43):

> "... the project, the witnesses and the documents are in Arizona ... in this connection all three parties are subject to the jurisdiction of the Arizona district court in Tucson, Arizona."

On the strength of this affidavit, the case was removed to Arizona (Union Tank Car Company v. Ward Industries Corporation, Civil 1482-Tuc.) (R.43). While the file in Civil 1482 was en route to Arizona, Dragor brought an action in Arizona against Union seeking $3,450,000 damages on the spurious ground that Union had lured Ward into becoming a joint adventurer with IMI. Respondent never sought to bring this action to trial.

At the time that Dragor purportedly withdrew from Arizona, it was also engaged in litigation in the same court in an action brought against it as the surviving member of the Joint Venture, by Mosher Steel Company, a materialman to the Joint Venture. On May 24, 1966 the district court rendered judgment against Dragor for said materials in the sum of $268,882.72.[6]

---

[6] The court also entered judgment against Union for the same amount on the ground that it had promised plaintiff to pay the Joint Venture's obligation.

In each case the litigation in Arizona was carried on there because of Dragor's affirmative action or default.

Moreover, Dragor has pending a counterclaim against Union for "in excess of $1,000,000" (R.98) alleging: (a) that Union had mishandled the claims assigned by Dragor under the Agreement of Settlement (R.101), and (b) that Union had violated its covenant not to sue by asserting in the course of the trial of the Mosher Steel case in the district court in Arizona that Union, if liable at all, was liable to Mosher only as a surety for Dragor.[7]

Judgment was rendered against Dragor under Rule 54, so the counterclaim, although set forth in the record, was not before the Court of Appeals at the time of the decision below. This accounts for the erroneous statement (Petition, P.21) in the opinion:

> "no contention raised in Union's complaint or Dragor's answer brings into question any issue of fact or law pertaining to the former dealings between these parties in Arizona."

Obviously, the counterclaim pertains solely and exclusively to the "former dealings between these parties in Arizona." The claim that Union mishandled claims arising out of the missile base contract involves the plans, specifications and change orders of the contract; the time and manner of presentation of the claims to the U.S. Engineers in Arizona; and the validity of the claims depends upon the manner and efficiency of the performance in the work in Arizona. The remaining portion of the counterclaim involves the evidence and

---

(7) The counterclaim, on Union's motion, was set for trial on December 7, 1965. Dragor declined to appear or present evidence and the court dismissed the action for want of prosecution. That dismissal is now on appeal by Dragor to the Ninth Circuit as Docket No. 20904.

pleadings in the Mosher Steel case, all of which repose with the court in Arizona.

In *Phillips* v. *Anchor-Hocking Glass Co., supra,* Arizona Supreme Court said:

> "... fair play includes a consideration of the quality, nature and extent of defendant's activity in the forum state, relative convenience of the parties in relation to the place of trial, the benefits and protections of the laws of the forum state afforded the parties, and the basic equities existing between the parties."

We respectfully submit that the Respondent's contention that it is insulated from the jurisdiction of the Arizona court by the agreement of settlement is without support, either in fact or in law. Dragor is no stranger to Arizona, but manifest injustice would result if Petitioner were required to sue Dragor, in New York or Delaware, as directed by the court below, because Respondent's counterclaim, which it asserts to be compulsory in nature, should, for the convenience of the court and parties, be tried in Arizona, if it is to be tried at all, because that is where the alleged acts giving rise to the counterclaim took place.

For all these reasons, we urge that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its judgment herein.

Respectfully submitted,

THOMAS C. MCCONNELL
134 South LaSalle Street
Chicago, Illinois 60603

HAROLD C. WARNOCK
Ninth Floor, Valley National Bank
Tucson, Arizona 85701